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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOYCE R. COLLINS,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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June 1995

QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces erred when, in the face of a silent record, it disposed of the petitioner's double jeopardy concerns on the basis of waiver.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Joyce R. Collins, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in her case on March 22, 1995.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces[1], 41 M.J. 428 (1995) is located at Appendix A. The unpublished opinion of the United States Air Force Court of Military Review[2] is located at Appendix B.

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[1] The court was previously named the United States Court of Military Appeals.

[2] The court has been subsequently renamed the Air Force Court of Criminal Appeals.

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on March 22, 1995. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1992) and 10 U.S.C.A. § 867(a) (Supp. 1992).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb. . . .

STATEMENT OF THE CASE

The petitioner was charged, *inter alia,* with violations of Articles 80, 107, and 121, of the Uniform Code of Military Justice (U.C.M.J.).[3] These charges were withdrawn prior to the entry of pleas. The petitioner pled not guilty to the sole remaining charge, and the four specifications thereunder, which alleged violations of Article 132, U.C.M.J., 10 U.S.C. § 932. The trial was terminated when the military judge granted a defense motion for mistrial. The basis of the mistrial was prosecutorial misconduct, particularly on the part of a Captain George May. In granting the motion, the military judge stated:

> Well, gentlemen, I'm very concerned at the way that this case has progressed. I'm not pleased with the way that it has been conducted. Although there is no one specific fact that I could point to that would be the deciding factor, there are so many facts, with regard to the production of evidence, and with regard to the conduct of the prosecution team; specifically, Captain George May, that I find that an atmosphere exists and that circumstances have arisen during the course of this proceeding which I find do

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[3] 10 U.S.C. §§ 880, 907 and 921, respectively.

> cast substantial doubt upon the fairness of the proceedings as they have been conducted to this point. I cannot, in good conscience, allow these proceedings to proceed from this point forward.
>
> Therefore, the defense's motion for mistrial, as it has been incorporated in Appellate Exhibit XIV, is granted.

Page 401 of the original record of trial.

On October 8, 1991, the sole remaining charge and specifications were referred to another general court-martial. Upon a prosecution motion, specifications 1 and 2 were withdrawn, and guilty pleas were entered as to specifications 3 and 4. The petitioner was sentenced to a bad conduct discharge, confinement for eight months, forfeiture of all pay and allowances, and reduction to pay grade E-1. During this second proceeding there was no discussion of the previously declared mistrial. On November 25, 1991, the convening authority, pursuant to a pretrial agreement, reduced the period of confinement to 60 days. In all other respects the sentence was approved.

The United States Air Force Court of Military Review, in an unpublished per curiam opinion, affirmed on May 27, 1992. On October 15, 1992, the United States Court of Military Appeals denied the petitioner's initial Petition for Grant of Review. However, on December 15, 1992, that Court granted petitioner's motion to suspend the rules and granted the petition for reconsideration, set aside the decision of the Air Force Court of Military Review and remanded for further review. On August 31, 1993, the Air Force Court of Military Review again affirmed in an unpublished decision (Appendix B). On February 1, 1994, the United States Court of Military Appeals granted the appellant's petition for review.

The petitioner's position on appeal was that the actions of the prosecution team were designed to "goad" a mistrial, and that her pleas of guilty at the second trial were

improvident since the military judge failed to address the issue of double jeopardy and obtain a knowing and voluntary waiver of this important constitutional right. The Air Force Court of Military Review, in affirming the convictions, held that the appellant had waived the double jeopardy issue by failing to raise it at her second trial. They also relied on this Honorable Court's decision in *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982) for the proposition that, even if waiver did not apply, "there was no governmental misconduct to 'goad' appellant into moving for a mistrial." *Collins*, unpub. op. at 2 (Appendix B).

The United States Court of Appeals for the Armed Forces, with the exception of Judge Cox's separate concurrence, did not reach the question of whether petitioner's case fell within the stricture of *Oregon v. Kennedy*. Instead, if relied upon the lower court's interpretation of *United States v. Broce*, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989) in finding that the petitioner's subsequent plea of guilty waived or forfeited the double jeopardy issue.

REASONS FOR GRANTING THE WRIT

The reliance by the Air Force Court of Military Review and the United States Court of Appeals for the Armed Forces on *Broce* was misplaced. This Court in *Broce* considered a collateral attack on two indictments to which the respondents had pled guilty to in a single proceeding. The indictments alleged two separate incidents wherein the respondents sought to rig construction bids. After the respondents trial, action was taken against another construction firm on similar charges. Unlike the respondents, the accused in the second trial entered not guilty pleas and were ultimately acquitted. When additional charges were subsequently filed against the second firm, that firm filed a motion to dismiss based on double jeopardy, which was granted by the trial court. The trial court found that

there was but one continuing conspiracy covering a twenty-five year period in the Kansas highway construction industry.

The respondents in *Broce*, watching the proceedings of the other accused "with awe, if not envy," filed a motion to dismiss. 488 U.S. at 567. The respondents relied on the results in the other firm's proceeding in arguing that there was only one conspiracy and, thus, it violated the double jeopardy clause to convict them of two separate conspiracies. The Tenth Circuit Court of Appeals agreed.

This Court reversed the decision of the Court of Appeals on the basis that the respondents were unable to "prove their claim by relying on those indictments and the existing record." 488 U.S. at 576. In short, this Court held that defendants cannot rely on facts outside the record to collaterally attack "indictments that on their face described separate conspiracies." 488 U.S. at 576.

This Honorable Court observed that "[a]n exception to the rule barring collateral attack on a guilty plea was established by our decisions in *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974) and *Menna v. New York*, [423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975)]." 488 U.S. at 574. In discussing *Menna*, this Court stated:

> The petitioner in *Menna* had refused, after a grant of immunity, to obey a court order to testify before a grand jury. He was adjudicated in contempt of court and sentenced to a term in civil jail. After he was released, he was indicted for the same refusal to answer the questions. He pleaded guilty and was sentenced, but then appealed on double jeopardy grounds. The New York Court of Appeals concluded that Menna had waived his double jeopardy claim by pleading guilty. We reversed, citing *Blackledge* for the proposition that "[w]here the State is precluded from haling a defendant into court on a charge, federal law requires that a conviction on that

charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." 423 U.S. at 62, 96 S.Ct. at 242. We added, however, an important qualification:

> "We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that—*judged on its face*—the charge is one which the State may not constitutionally prosecute." *Id.*, at 63, n.2, 96 S.Ct. at 242, n.2 (emphasis added).

In neither *Blackledge* nor *Menna* did the defendants seek further proceedings at which to expand the record with new evidence. In those cases, the determination that the second indictment could not go forward should have been made by the presiding judge at the time the plea was entered in the basis of the existing record. Both *Blackledge* and *Menna* could be (and ultimately were) resolved without any need to venture beyond that record.

488 U.S. at 575.

In the case *sub judice*, the appellant is not claiming that the double jeopardy issue arose from comparing the charges in her case with the results in some other accused's trial, nor is she seeking to expand the record. It is the *petitioner's* record, consisting of the transcripts of both proceedings, which forms the basis for petitioner's argument that the government was precluded from twice haling her into court.

The petitioner's record is completely silent regarding any knowledge on her part of the rights she supposedly "waived." As this Court noted in *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), finding waiver under such circumstances is improper:

> The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In *Carnley v. Cochran*, 369 U.S. 506, 516, 82 S.Ct. 884, 890. 8 L.Ed.2d

> 70, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."
>
> We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standard.

395 U.S. at 242-243. This Honorable Court has applied *Boykin* to double jeopardy issues. *See Ricketts v. Adamson,* 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987).

Notwithstanding the admonition in *Boykin,* the United States Court of Appeals for the Armed Forces relied on the "silent record" to find waiver in this case. That court stated: "Like *Broce,* the double-jeopardy claim here cannot be resolved on the "existing record." 41 M.J. at 430. This statement ignores both the existence of a record from the first proceeding in the petitioner's case, as well as the fact that it is the very silence on the issue during the second proceeding which calls into question the providency of the appellant's pleas. Had she known of her right to challenge the second proceeding on double jeopardy grounds, she would have sought to establish the prosecutorial "goading" necessary to prevail under *Oregon v. Kennedy, supra.*

It has long been observed by the military appellate courts that "defenses based on the statute of limitations or former jeopardy" are "in the nature of confession and

avoidance or estoppel." *United States v. Clark*, 26 M.J. 589, 596 (A.C.M.R. 1988), aff'd 28 M.J. 401 (C.M.A. 1989). This recognition of the similarities between statute of limitations and double jeopardy is illuminating. Whenever a statute of limitations issue appears, the military judge is required to bring the matter to the attention of the accused. *See e.g., United States v. Shinault*, 28 M.J. 666, 667 (N.M.C.M.R. 1989) ("because there was not a knowing waiver of the statute of limitations during the providency inquiry, the plea is improvident"); *United States v. Salter*, 20 M.J. 116, 117 (C.M.A. 1985) ("Almost 28 years ago, we held that it was well established in military jurisprudence that whenever it appears that the statute of limitations has run against an offense, that fact will be brought to the attention of the accused by the court."), citing *United States v. Rodgers*, 8 U.S.C.M.A. 226, 24 C.M.R. 36 (1957).

A similar requirement should be required when potential double jeopardy issues arise. This is certainly true when the military judge is aware that a prior proceeding was conducted regarding the same alleged offenses. At a minimum, he should have inquired whether the appellant was waiving such a potential defense to prosecution. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938). As Judge Cox noted in his concurrence, "if an accused wants to waive a statutory or constitutional right, we should be able to see from the record that the accused knowingly gave up that right." 41 M.J. at 431.

CONCLUSION

By resorting to a waiver/forfeiture analysis, the United States Court of Appeals for the Armed Forces never addressed the petitioner's important constitutional concerns. That court never determined whether, based on the entire existing record, the petitioner had been subjected to double jeopardy. Nor did they consider whether, if the record was insufficient to find double jeopardy, the petitioner knowingly waived the right to develop the record prior to entering guilty pleas. The United States Court of Military Appeals should be directed to consider these issues. The petitioner respectfully requests that this Honorable Court grant the petition for writ of certiorari and remand to the United States Court of Appeals for the Armed Forces for further consideration.

Respectfully submitted,

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June 1995

APPENDICES

APPENDIX A

U.S. COURT OF APPEALS
FOR THE ARMED FORCES

No. 68,381

CMR No. 29663

UNITED STATES,

Appellee,

v.

JOYCE R. COLLINS, Sergeant U.S. Air Force,

Appellant.

Argued Dec. 15, 1994

Decided March 22, 1995

OPINION OF THE COURT

CRAWFORD, Judge:

1. Pursuant to her pleas, appellant was convicted of presenting false claims (2 specifications), in violation of Article 132, Uniform Code of Military Justice, 10 USC § 932. She was sentenced to a bad-conduct discharge, 8 months' confinement, total forfeitures, and reduction to the lowest enlisted grade. Pursuant to a pretrial agreement, the convening authority reduced the term of confinement to 60 days but otherwise approved the sentence. The Court of Military Review, now the Court of Criminal Appeals, affirmed the findings and sentence. We granted review on the following issues, 39 MJ 385:

I

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED WHEN:

A

THEY [SIC] MISCONSTRUED THE DECISION OF THE UNITED STATES SUPREME COURT IN *UNITED STATES V. BROCE*, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989) IN FINDING THAT APPELLANT WAIVED THE ISSUE OF DOUBLE JEOPARDY, and

B

WHETHER THEY [SIC] INCORRECTLY FOUND, EVEN IF WAIVER DID NOT APPLY, THAT THE PROSECUTORIAL MISCONDUCT WAS DESIGNED MERELY TO PERFECT THE GOVERNMENT'S CASE RATHER THAN TO PROVOKE A MISTRIAL.

II

WHETHER APPELLANT'S PLEAS WERE IMPROVIDENT WHEN THE MILITARY JUDGE FAILED TO ADDRESS THE ISSUE OF DOUBLE JEOPARDY AND OBTAIN A KNOWING WAIVER OF THIS IMPORTANT CONSTITUTIONAL RIGHT PRIOR TO ACCEPTING HER PLEAS OF GUILTY.

2. We hold that the Court of Military Review did not misconstrue the *Broce* decision and that there was a legitimate waiver by a failure to raise the double-jeopardy provisions as set forth in the Constitution, Uniform Code, and the Manual for Courts-Martial.

FACTS

3. On August 13, 1991, appellant's case was originally referred to trial for violations of Articles 80, 107, 121, and 132, UCMJ, 10 USC §§ 880, 907, 921, and 932, respectively. These charges grew out of a do-it-yourself move by appellant from Nellis Air Force Base, Nevada, to Columbia, South Carolina. During the pretrial stages, it became known that the base military justice officer, Captain M, was engaged in an additional investigation of certain potential defense witnesses and several witnesses, albeit unwilling, for the Government. When the court opened on August 23, 1991, the defense moved for a mistrial or a "lengthy continuance" to investigate the additional evidence. The thrust of the motion was that the Government was not complying fairly with appellant's request for discovery and was intimidating witnesses. After a hearing into Captain M's conduct, a mistrial was granted over the prosecution's objection. The judge made no specific findings of prosecutorial misconduct, but he found "that an atmosphere exists and that circumstances have arisen during the course of this proceeding which I find do cast substantial doubt upon the fairness of the proceedings as they have been conducted to this point."

4. As the Court below found: "The ill-advised trial preparation [by the prosecution] was fully explored and we are convinced the intent of the activity was to perfect the government's case, rather than provoke a mistrial." Unpub. op. at 2. We will not disturb such findings unless they are clearly erroneous. *Cf. United States v. Burris,* 21 MJ 140, 144 ¶ 8 (CMA 1985).

5. A new general court-martial was convened on October 8, 1991. At that time appellant entered unconditional pleas to the charge and the two specifications of presenting false claims. There was neither a discussion of the earlier proceeding nor a motion to dismiss the charge and specifications because of double jeopardy.

DISCUSSION

6. The Constitution, the Code, and the Manual for Courts-Martial offer protection against being tried twice for the same offense. The Fifth Amendment to the United States Constitution provides, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Article 44(a) of the Code, 10 USC § 844(a), provides: "No person may, without his consent, he tried a second time for the same offense." RCM 907(b)(2)(C), Manual for Courts-Martial, United States, 1984, provides: "A charge or specification shall be dismissed upon motion made by the accused before the final adjournment of the court-martial in that case if . . . [t]he accused has previously been tried by court-martial . . . for the same offense. . . ." However, these rights may be waived, since RCM 907(b)(2) is designated as "Waivable grounds."

7. The Court of Military Review held that the double-jeopardy issue was waived by appellant's guilty pleas. The Court cited *United States v. Broce*, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989), and RCM 907(b)(2)(C) as controlling. The defense would distinguish the Manual provision and *Broce* and argue, pursuant to *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), that they were goaded into a mistrial.

8. In *Oregon v. Kennedy*, 456 U.S. at 676, 102 S.Ct. at 2089-90 ¶ 17, the Court held: "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." As this Court stated in *United States v. DiAngelo*, 31 MJ 135, 137 ¶ 6 (CMA 1990): "Mere overreaching by a prosecutor is not enough; the record must show that the prosecutor or judge sought 'to "goad" the defendant into moving for a mistrial.'" Quoting *Oregon*

v. Kennedy, 456 U.S. at 676, 102 S.Ct. at 2089. The defense would also rely on *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975), where the Court held that the defendant's previously asserted claim that his indictment should be dismissed on double-jeopardy grounds was not waived by a plea of guilty. The Court in *Broce* held that the guilty plea resulted in a "forfeiture" as distinguished from knowing waiver. 488 U.S. at 573, 109 S.Ct. at 764 ¶¶ 19 and 18. The *Broce* Court distinguished *Menna* by indicating that *Menna* could be resolved on the "existing record" because of a motion to dismiss prior to the guilty plea and, thus, came under an exception to the general rule of forfeiture. *Id.* at 575, 109 S.Ct. at 765-66 ¶¶ 23 and 24. Unlike the situation in *Menna*, here appellant made no such motion to dismiss prior to her guilty plea.

9. As we stated in *United States v. Cause*, 37 MJ 308, 311 ¶ 12 (CMA 1993):

> The waiver rule places responsibility upon defense counsel to object. . . . This rule is designed . . . to prevent defense counsel from remaining silent, making no objection, and then raising the issue on appeal for the first time, long after any possibility of curing the problem has vanished. It is important "to encourage all trial participants to seek a fair and accurate trial the first time around."

10. In *United States v. Jones*, 37 MJ 321, 323 ¶ 15 (CMA 1993), we asserted:

> The rationale behind [waiver-] forfeiture is judicial economy. If an individual is permitted not to object and then can raise the issue on appeal, both the parties and the public are put to the expense of retrial. It is important for the objection to be made at the trial level so it can be resolved there to avoid the expense of an appeal. . . .

11. Like *Broce*, the double-jeopardy claim here cannot be resolved on the "existing record" because no mo-

tion was made prior to the plea. The military judge at the first trial made no finding of fact that the prosecution was trying to goad the defense into a mistrial, and the judge at the second court-martial did not hold any hearing or make any findings as to the reason for the mistrial. In fact, the record reveals that at the first trial the prosecution objected to a mistrial and a lengthy delay. To this date, the defense has offered no evidence that this resistance was a sham. Thus, we hold that the Court of Military Review did not misconstrue the *Broce* decision, so appellant's pleas of guilty were provident.

The decision of the United States Air Force Court of Military Review on further review is affirmed.

Chief Judge SULLIVAN and Judges GIERKE and WISS concur.

COX, Judge (concurring in part):

12. In this case I part company, narrowly, on the question of waiver. *See United States v. Huffman,* 40 MJ 225 (CMA 1994). In my mind, waiver is the "intentional or voluntary relinquishment of a known right." *See Black's Law Dictionary* 1580 (6th ed. 1990). Therefore, before I tax a service-member with the mantle of waiver of a constitutional or statutory right, I want to be certain that the member knows that he or she enjoys that right. *See United States v. Johnson,* 21 MJ 211, 216-17 ¶ 25 (CMA 1986) (Cox, J., concurring in the result), where I stated:

> One important reason to insist that military judges build a complete record is to insure that our military justice system continues to operate with the highest standards and is a model of justice in the field of criminal law. It is far more difficult for an accused to complain of unfair or unjust treatment when the record of trial clearly indicates that

he understood each and every allegation against him; that he understood each and every right he had at each stage; that he knowingly and consciously waived any of those rights; and that, when appropriate, he acknowledged his own belief in his guilt. Without a complete record to perpetuate these matters, the military justice system is vulnerable to the allegation that it is a system of "drumhead justice."

13. I acknowledge that the Supreme Court of the United States may not require intentional waiver to satisfy constitutional norms of due process to the same degree that I believe that perhaps military due process should. After all, that is why we have lawyers in the courtroom, isn't it? Lawyers advise clients of their rights. That is certainly true. Nevertheless, in my judgment the benefits from obtaining waivers on the record of trial far outweigh the minor inconvenience to judges and trial attorneys which comes from doing it right. Therefore, I believe that we should require waiver of constitutional and statutory rights to be an affirmative, knowing waiver.

14. That same rationale does not apply to trial tactics and errors. According to Mil.R.Evid. 103(a), Manual for Courts-Martial, United States, 1984: "Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party." *See also* Art. 59(a), Uniform Code of Military Justice, 10 USC § 859(a), which states: "A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." *See also United States v. Fisher,* 21 MJ 327 (1986).

15. Judge Crawford made a good argument for the validity of these "raise or waive" rules in her separate opinion in *United States v. Huffman, supra* at 229 ¶ 15. I do not disagree with her views to the extent we are

talking about events which transpire in the course of the litigation, whether before, during, or after trial.

16. It would be folly to try to list all the various types of issues and objections which arise during litigation, including pretrial and post-trial litigation, which are subject to the "raise or waive" rules. *See* RCM 907, Manual, *supra*. Suffice it to say here, if an accused wants to waive a statutory or constitutional right, we should be able to see from the record of trial that the accused knowingly gave up that right.

17. Nevertheless, even with this principle in mind, I approach a case such as this one (and *Huffman*) with a different perspective from that of the then-Air Force Court of Military Review and my colleague, Judge Crawford. First, I ask, "What is the error being alleged?" Second, "Is it error?" Third, "Was the error waived by failure of counsel to object or otherwise raise it at trial?" *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *United States v. Fisher*, *supra*, and other harmless-error cases. I recognize that I may be arguing semantics, but it seems to me that this approach is mandated by Article 59(a) and Mil.R.Evid. 103. How else can an appellate judge determine if the error materially prejudiced an accused if the judge never considers the error?

18. The error alleged here is that appellant's court-martial was barred by the Double Jeopardy Clause of Amendment V of the Constitution or by Article 44(a), UCMJ, 10 USC § 844(a). The Court of Military Review disposed of the case "on waiver grounds," unpub. op. at 2, *citing United States v. Broce*, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989), and RCM 907 (b)(2)(c). Like the majority here, however, they continued with the following utterance:

> Although we dispose of this case on waiver grounds, it is clear we would find no basis for relief

> here if the double jeopardy objection had been made by appellant at the second trial [relying on *Oregon v. Kennedy*, 456 U.S. 667, 675-76, 102 S.Ct. 2083, 2089-90, 72 L.Ed.2d 416 (1982)].

Unpub. op. at 2.

19. I would approach this case from the opposite direction and hold that the accused was not tried twice for the same offense. *Oregon v. Kennedy*, 456 U.S. at 675-76, 102 S.Ct. at 2089-90 ¶ 17; *United States v. DiAngelo*, 31 MJ 135 (CMA 1990). Appellant has not met her burden to show that the prosecutor goaded her into her mistrial motion.

20. Because there was no error, there is nothing to waive. Because there is no error, we do not have to test the error for harmlessness. Because there is no error, we do not have ot consider whether the accused had effective assistance of counsel at her courtmartial rather than consider whether a competent attorney would have raised the double-jeopardy question. Lastly, because there is no error, we do not have to consider whether *United States v. Broce, supra,* applies to a military accused under Article 44 or whether Article 45, UCMJ, 10 USC § 845, requires us to provide the military member an expanded right that must be protected under due process considerations. *See Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975), and *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2089, 40 L.Ed.2d 628 (1974).

Except for these observations, I concur. There was no double-jeopardy violation in appellant's case.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 29663 (f rev)

UNITED STATES

v.

Staff Sergeant JOYCE R. COLLINS, FR247-41-3323
UNITED STATES AIR FORCE

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31 August 1993

Sentence adjudged 8 October 1991 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: H. Martin Jayne.

Approved sentence: Bad-conduct discharge, confinement for 60 days, forfeiture of all pay and allowances, and reduction to E-1.

Before
DIXON, GRUNICK, and HEIMBURG
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

We are reviewing this case for the second time. Our first review resulted in affirmance of appellant's conviction originally submitted to us on its merits. Appellant's petition for grant of review was denied by the Court of Military Appeals on 15 October 1992. Following denial of review, appellant requested reconsideration and submitted documents to the Court of Military Appeals. They granted appellant's request, set aside our prior affirmance and remanded this case to us for further review.

During appellant's first trial the military judge granted a defense motion for a mistrial. At her second trial and pursuant to her unconditional pleas of guilty, appellant was convicted of two specifications of making a false claim, in violation of Article 132, UCMJ. The approved sentence includes a bad-conduct discharge, 60 days confinement, total forfeitures, and reduction to E-1. Among the six errors submitted to us, appellant asserts her second trial was barred by double jeopardy and a *Dubay* hearing should be ordered to determine whether prosecutorial misconduct necessitated a mistrial. Deciding all issues adversely to appellant, we affirm the findings and sentence.

At the first trial the military judge granted a defense motion for a mistrial, finding the late production of evidence and the conduct of a judge advocate in providing out-of-court assistance to the trial counsel cast substantial doubt on the fairness of the proceedings. Before granting the motion, the military judge extensively questioned all trial participants and heard testimony from the offending judge advocate. A continuance was considered as an alternative to the mistrial but was discounted by the military judge as an inappropriate option.

Appellant failed to raise a double jeopardy objection during her second court-martial. We hold former jeopardy is waived if not raised before final adjournment of the court. *United States v. Broce*, 488 U.S. 563 (1989); R.C.M. 907(b)(2)(C).

Although we dispose of this case on waiver grounds, it is clear we would find no basis for relief here even if the double jeopardy objection had been made by appellant at the second trial. A second trial is barred when defense requests a mistrial prior to findings only when appellant can establish the government's conduct at the first trial was of a nature designed to intentionally bring about the mistrial. R.C.M. 915(c)(2). After carefully reviewing the record of trial, we are convinced there was no governmental misconduct intending to "goad" appellant into moving for a mistrial. *Oregon v. Kennedy,* 456 U.S. 667, 675-676 (1982). The mistrial motion was fully litigated at appellant's first trial. The ill-advised trial preparation was fully explored and we are convinced the intent of the activity was to perfect the government's case rather than provoke a mistrial. Article 66(c), UCMJ.

We have examined the four remaining issues submitted pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982), and find appellant's pleas of guilt were provident, the court-martial had jurisdiction to try her, the issues concerning improperly issued subpoenas and the admissibility of her statements to investigators were waived by her guilty pleas. *United States v. Care,* 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969); Article 2(a)(1), UCMJ 905(b)(3) and 905(e); Mil. R. Evid. 103(a)(1).

The findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

OFFICIAL

"ORIGINAL SIGNED BY"

LAURA L. GREEN
Clerk of Court
Air Force Court of Military Review

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